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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 713

WINDHAM CREAMERY, INC., and FARMLAND DAIRIES,
Petitioners,

v.

ORVILLE L. FREEMAN, Secretary of Agriculture,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Windham Creamery, Inc., (hereinafter called "Windham") and Farmland Dairies, (hereinafter called "Farmland"), pray that a writ of certiorari issue to review to review the judgment of the United States Court of Appeals for the Third Circuit entered on August 13th, 1965, at No. 15,078, below.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey is reported in 230 F. Supp. 632 (1964). That of the United States Court of Appeals for the Third Circuit is printed in the Appendix hereto, at page 9a, and as yet unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on August 13th 1965, and the jurisdiction of the court is involved under Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED

These proceedings are brought under the Agricultural Adjustment Act of 1933, as amended and supplemented by the Agricultural Marketing Agreement Act of 1937, 7 USCA, p. 417, Sec. 601, et seq. It was declared in these acts to be the policy of Congress, through the power conferred upon the Secretary of Agriculture,

> "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices . . .".

Throughout these acts, the Secretary of Agriculture is mandated to provide uniformity in each marketing area relating to classification, pricing, etc., and to protect the consumer, both in the public interest. Under the authority so granted by these Acts, the Secretary of Agriculture has established marketing orders to regulate the handling of milk and milk products in various marketing areas throughout the country. The issues in the present case arise out of certain provisions included by the Secretary in Order #27 (now Order

#2, but hereinafter referred to as Order #27 to maintain relationship with the record, etc., in this case) which is the Milk Marketing Order in effect in the New York-New Jersey Milk Marketing Area at all times herein mentioned, and presently. Under this Order, pool plants are fully regulated by the Order and must comply with the various shipping and sales requirements of the Order. A pool handler is one who operates such a plant. The questions presented are:

1. Are the provisions of Section 927.37 (c) which classify fluid cream as Class II when marketed on the New York side of the Hudson River in the New York Metropolitan District of the New York-New Jersey Milk Marketing Area of Order #27, while identical fluid cream, leaving the same plant in the same form and used for the same purposes is classified by Section 927.37 (d) as Class III when marketed on the New Jersey side of the Hudson River and outside the New York Metropolitan District, but in the same New York-New Jersey Milk Marketing Area of this Order for the purpose of establishing different prices for the same identical product and when the Class II price is higher than the Class III, erroneous and illegal because they are contrary to the express provisions of Section 608c (5) (A) of 7 U.S.C.A. 450?

2. Do the basic facts, as found by the Secretary to support this Order and the applicable law legally justify two different prices for identical fluid cream with that marketed in the New York Metropolitan District of the New York-New Jersey Milk Marketing Area called "Class II" with a higher price than that marketed in the other parts of the area and on the New Jersey side of

the Hudson River called "Class III" with a lower price?

3. Was the fluid cream involved here and delivered to ships in the New York Metropolitan District area of this Order, and on the New York City side of the Hudson River, in the current of foreign commerce and by reason thereof not regulated by Section 927.37 (c) and (d) (1) of Order #27?

4. Did the Secretary properly apply the provisions of Order #27 to this fluid cream delivered to ships in the New York Metropolitan District of Order #27 in the event they weren't erroneous and were legal?

STATUTES, ORDERS AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes involved are the Agricultural Adjustment Act of 1933, 48 Stat. 31, Agricultural Marketing Agreements Act of 1937, 50 Stat. 246, amendatory thereof and supplementary thereto, 7 U.S.C.A., Sec. 601, et seq. Provisions applicable here are set forth in Appendix hereto, pages 7a-8a.

The administrative order is Order #27, as amended, regulating the handling of milk in the New York-New Jersey Milk Marketing Area. The particular provisions directly involved are Sections 927.3, 927.4, 927.5, 927.6, 927.7, 927.9, 927.30, 927.33 and 927.37 (c) and (d) (1). These are set forth in Appendix hereto on pages 5a-8a.

The constitutional provisions involved are Article I, Section I, and Section 8, Clause 3, also set forth in Appendix hereto on page 1a.

STATEMENT OF THE CASE

Petitioner Windham did at times involved here, operate a country milk plant at Windham, New York. It purchased milk there from farmers in the area, and after the receipt and handling of it, shipped it to the milk processing and packaging plant of Fairlawn Dairies, Inc. (hereinafter called "Fairlawn"), at 5-01 River Road, Fairlawn, New Jersey. Windham and Fairlawn are wholly owned subsidiaries of Petitioner Farmland (78a) (2). Windham's operations and interests herein were transferred to Farmland while these proceedings were pending before the U. S. Circuit Court of Appeals for the Third Circuit and such recognized by that Court as proper and effective. Farmland has continued, and is presently continuing, Windham's operations.

These farmers are "Dairy farmers" and Windham, Fairlawn and Farmland are "Handlers" as such are defined in Order #27. Windham's plant was at all times, and presently is, as operated by Farmland, a "pool plant" and under the jurisdiction of Order #27 and the prices which are paid to these milk farmers for their milk are controlled by said Order. They are reported to the Market Administrator in the New York City Metropolitan District for pooling, audit, etc.

During the period involved here, and ever since, large quantities of milk from Windham's country plant were processed at the Fairlawn plant into fluid cream. After processing and packaging, it was sold by Fairlawn to its customers. Some of it was sold to American Export Lines, Inc., which operates a large fleet of ocean-going ships between the Port of New York and foreign ports. These ships include the well-

known passenger liners UNITED STATES, INDEPENDENCE and CONSTITUTION. These larger ships sail from pier 84, New York City every two (2) weeks. It has two (2) combination freight and passenger ships and about twenty (20) freighters which sail from Hoboken, New Jersey at various times. All this area is in the Port of New York. The passenger ships also carry freight (25a).*

American Export Lines, Inc., has its purchasing department and its purchasing agent at its offices at River and 1st Streets, Hoboken, New Jersey (23a). From this location, it purchased fluid cream from Fairlawn at its plant at Fairlawn, New Jersey (31a) during this period. It directed that parts of it be delivered to its ships at piers in Hoboken, New Jersey, and the other parts to its ships at its piers in New York City. All of it was refrigerated and packaged in one-quart containers and then in cartons. All this fluid cream was identical in form, quality, and packaging (67a, 68a, 69a). It was delivered to the designated pier between 7:00 and 8:00 A.M. on the day of sailing, was then placed in the refrigerated cargo-hold of the ship, and kept there until the ship cleared the Port of New York and was on the high seas. Most sailings were at 12:00 noon, and none of this cream was used until served to its passengers at dinner the same evening. The ship was then over one hundred (100) miles from the continental United States. All was served to passengers travelling to foreign ports. None of it was for the crew or consumed in the Port of New York and the New York-New Jersey Marketing Area or the New York Metropolitan District part of that market-

* All these references above and hereafter are to appendix pages in petitioners appendix before the Circuit Court of Appeals).

ing area. All was consumed on a ship while engaged in foreign travel and it was in the current of foreign commerce (45a thru 49a).

The Market Administrator of Order #27, determined, under Sections 927.30 and 927.37 of Order #27, that the fluid cream delivered to the Hoboken piers be classified as Class III under the Order and that delivered to the New York City piers be classified as Class II. Class II carried an approximately fifteen percent (15%) higher price to be paid by Windham than the Class III price. Consequently, Windham has paid about thirty-six thousand dollars ($36,000) more for this fluid cream than it should at time of consideration by the Circuit Court. Besides, Windham has continued to pay additional large sums for it during the pendency of these proceedings, and now Farmland is doing so. None of these facts are disputed.

Windham appealed this Class II classification of this fluid cream administratively upon the grounds (1) that it wasn't based upon the statutory "difference in form or the purpose for which used" to justify it, (2) that it was unlawful to establish a market within a market for this fluid cream, (3) that it was unregulated because it was in the current of foreign commerce, and (4) that proper application of the terms and provisions of the order to this fluid cream required it to be given a Class III classification, (5) this situation wasn't considered in making the order, and (6) this fluid cream was merely in transit through the market. This Hearing Examiner, after a full hearing and consideration of the facts and law involved, filed his report upholding the Class II classification for the fluid cream delivered to these ships on the New York side of the Hudson River, and based his report upon the Secre-

tary's findings that fluid cream had a higher economic value in the New York Metropolitan District than in New Jersey, and such was a proper basis for different classifications of the same product despite the statutory requirements and limitations on classification; and upon his finding that it was legal to establish a market within a market for the same product; that this fluid cream was not in foreign commerce; and the Order had been properly applied to it. Exceptions were filed to this report by Windham and the Judicial Officer upheld the report. Petition for rehearing was denied.

Petitioner Windham appealed to the U. S. District Court for the District of New Jersey pursuant to the judicial remedy provided by Section (15) (B) of the Act. Judge Coolahan upheld the Secretary on the grounds that it was legal to classify milk according to its economic value and that this fluid cream wasn't in the current of foreign commerce. Thereupon, Windham appealed to the United States Circuit Court of Appeals for the Third Circuit, and it also upheld the District Court for the same reasons.

REASONS FOR GRANTING THIS WRIT

I. The Decision of the United States Circuit Court of Appeals Disregards and Conflicts With the Pertinent Provisions of the Statute Requiring and Providing a Basis for Classification of Milk and Also Conflicts With Decisions of the Other U. S. Circuit Courts of Appeals Relating Thereto

The controlling section of the law is 608(c)(5)(A), 7 U.S.C.A. 450, which provides for and requires the

> "classifying of milk in accordance with the form in which or the purposes for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification".

This entire section appears in Appendix hereto at page 3a. In *Queensboro Farm Products,* v. *Wickard* (D.C. N.Y. 1942, 47 Fed. Supp. 206, affirmed by C.A. 137 F. 2d 969, the court discussed and determined the meaning of the foregoing on page 971, etc., as follows:

> "* * *. (2) That same section, however, provides for two alternative kinds of 'use classification'; and milk may lawfully be classified by the Secretary 'in accordance with' (1) 'the form in which' the mik is used, or (2) 'the purpose for which' it is used. The provision is disjunctive".

Again in *Crowley's Milk Co.* v. *Brannan,* Cir. Ct. N.Y. (1952) 198 F. 2d 861, Judge Clark, speaking for the majority of the Court said:

> "The act itself authorizes a classification of the milk in accordance with either 'the form' in which or 'the purpose' for which it is used".

And Judge Frank, in his dissenting opinion in the Crowley case agrees with the foregoing. He says:

> "Act authorizes the Secretary to classify milk to either (a) 'the form in which the milk is used at or moved from the initial handlers' plant, or (b) the purpose for which it is used by a subsequent purchaser from the initial handler with respect to such a purpose".

The Circuit Court upheld the Secretary's classifications, although it conceded that the form of this fluid cream was the same in Class II as in Class III, on the ground there was a difference in the purpose for which used. This difference in purpose was based upon a finding that the economic value of the identical fluid cream was higher in the NewYork Metropolitan District of this market than in the New Jersey and other

areas of this market. There is no relationship in the meaning between purpose and economic value. This is very clearly erroneous. The purpose for which used was exactly the same; table use by the passengers on all these ships, regardless of whether they sailed from Hoboken or New York City. It is also very obvious that higher economic value has no relationship to "purpose for which it is used". Apparently, the Circuit Court recognized this error when it said further that the Secretary has been doing this so long that it justified it.

If the statutory authority for this is lacking and such should be available, the administrative agency should present the matter to Congress. See *Regents of University System of Georgia* v. *Carroll,* 338 U.S. 586, 600; *Addison* v. *Holly Hill Fruit Products,* 332 U.S. 607; *F.C.C.* v. *American Broadcasting Co.,* 347 U.S. 284.

II. There Are No Provisions in the Law or in the Basic Facts for the Establishment of These Two Different Prices for This Fluid Cream and by Reason Thereof, the Decision of the United States Circuit Court of Appeals Is Erroneous

This statute must be strictly construed because this program of price fixing is contrary to the common law. The Secretary has conceded throughout these proceedings that the provisions of this Order must be strictly construed, and such applies to the statute. See *Carlo* v. *The Okonite-Callendar Cable Co.,* 3 N.J. 253, N.J. Supp. Ct. (1949), *Blackman* v. *Iles,* 4 N.J., 71 (1950).

The basic findings of fact do not legally support these two different prices for this same fluid cream by this market within a market. After hearings to support this Order, the Secretary found (1) the territory con-

sisting of the New York City area, Northern New Jersey, and Upstate New York, possess the essential characteristics for one Order; (2) milk for the entire area is produced in a common production area; (3) health requirements are substantially similar throughout; (4) many of the same distributors operate in all these areas; (5) minimum class prices should be uniform; (6) separate orders do not constitute an acceptable program; and (7) state marketing conditions require uniformity of pricing, and there is no economic justification for different prices, etc. (22 F.R. 4194 thru 4199).

Without any provisions of the law and with the foregoing findings of fact, there is certainly no basis for two different prices for this identical fluid cream, and the fixing of such is arbitrary, discriminatory and illegal. This requires that the fixing of a higher price for fluid cream in the New York Metropolitan District be declared illegal.

III. The Fluid Cream Involved Here Was in the Current of Foreign Commerce and by Reason Thereof, These Sales Were Not Regulated by Sections 927.37(c) and (d) of Order No. 27

It is a fundamental principle of law that foreign commerce is commerce and transactions which either immediately or at some stage of their progress are extra territorial, *Lord* v. *Steamship Co.,* 102 U.S. 541, 26 L. Ed. 224 (1880). The law is well settled that commerce begins where the movement of a product is actually begun, *U. S.* v. *Riggin,* S.D. Iowa, 10 F. Supp. 300 (1935), and equally established, a shipment of goods is in the current of foreign commerce where the goods have actually started for their destination in foreign commerce and even when still in possession of

the seller. When foreign commerce is involved, it embraces all component parts of the transaction and none of these component parts can be separated and held to be interstate or intrastate, 15 C.J.S. Sec. 25 pp. 290, 291. In *Baldwin* v. *Seelig,* 294 U.S. 511, 55 S. Ct. 497, 79 L.Ed. 1032, 101 A.L.R. 55, the U.S. Supreme Court affirmed this principle of law and prevented the State of New York from attempting to regulate milk in interstate commerce when sold in New York State.

It is undisputed that the progress and transportation of this fluid cream was extra-territorial and beyond the territorial limits of the United States. American Export Lines, Inc., is engaged in operating ships between Hoboken, New Jersay and New York City and foreign ports in foreign commerce; this fluid cream was sold to it at Hoboken, New Jersey; transported from the plant of Farmland-Fair Lawn Dairies at Fair Lawn, New Jersey to its ships at Hoboken and New York City on the day of sailing to foreign ports; and no part of it was used until these ships were on the high seas, beyond the territorial limits of the United States and en route to foreign ports. It was consumed by passengers traveling to these foreign ports.

The policy and purposes of the statutes here are clearly stated in Sections 601 and 602 (7 U.S.C.A. 417-420). These are clear, unambiguous, definite, and specific. They do not give the Secretary authority to regulate milk and milk products in the current of foreign commerce. Section 601 is a declaration of conditions which establishes the need for federal regulations. This specifically declares "this need to be only for orderly exchange of commodities in interstate commerce". There is no mention of a disruption of

the orderly exchange of commodities in the current of foreign commerce, nor of any need for such regulation.

Section 602 is entitled "*Declaration of Policy; establishment of base periods for prices and marketing standards.*" These are the standards legally necessary, as will be shown later, to govern the action of the Secretary. Section 602(1) provides for the establishment of parity prices for farmers through the exercise of the powers set forth in this and certain other sections of the act establishing orderly marketing conditions in interstate commerce only. Section 602(2) sets a standard for the adjustment of prices to parity to protect the consumer and directs such be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets. Again he is authorized to use them and certain powers set forth in this and other sections of the act to accomplish it. This section is so related to Section 601(1) that it, too, is confined to the orderly marketing of commodities in interstate commerce. Again no mention is made of foreign commerce. Section 602(3) provides for the establishment of standards of quality, parity, grading and inspection, etc., except for milk and milk products, through powers in this and certain other sections of the Act in interstate commerce only. No mention is made here of foreign commerce. Section 602(4) does not change the foregoing, does not find there is any need for the regulation of commodities in foreign commerce, and does not mention this need. The other sections mentioned throughout the foregoing (i.e, Sections 603-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623) relate to the powers of the Secretary to effectuate the declared policy of the Act. In Section 608(b) relating to marketing agreements and their exemption

from anti-trust laws and in Section 608(c) relating to orders regulating the handling of named agricultural commodities, there is a provision for regulation of foreign commerce. However, Congress has not found any need for such regulations and without such need to support it, it is obviously illegal and not effective. Besides, this provision relating to foreign commerce contradicts the declarations of policy which establish that the need for regulation extends only to interstate commerce. By Act of June 3, 1937, C296, Section 1, 2, 60, Statutes 246, Congress affirmed the foregoing provision of this law without change.

No standards are set forth in this statute to govern the Secretary for the exercise of a power to regulate milk and milk products in the current of foreign commerce. There is no doubt that Congress may delegate to the Secretary the exercise of a limited portion of its legislative power with respect to some specific subject matter. However, such delegation of legislative power must always at the same time prescribe standards that are to govern the Secretary in the exercise of the powers thus delegated. Any delegation of such legislative power without setting up adequate standards to guide the Secretary in this respect is wholly invalid, illegal and unconstitutional. *Lichter* v. *U. S.*, 334 U.S. 742, 68 Sup. Ct. 1294, 92 L. Ed. 1694 (1948); *J. S. Hampton, Jr. & Co.* v. *U. S.*, 276 U.S. 394, 72 L. Ed. 624 (1928), 48 S. Ct. 348; *American Power & Light Co.* v. *Securities,* 329 U.S. 90, 91, L. Ed. 103, 67 Sup. Ct. 133 (1946). There has been no valid delegation of power here.

Even if the Secretary had the power to regulate milk and milk products in the current of foreign commerce, he has not done so legally, nor attempted to do

so. In the Secretary's decision of June 10th, 1957, he stated that the material issues were (1) whether the handling of milk in additional territory in the States of New York and New Jersey (outside that currently regulated under Order #27) should be subject to Federal regulation, and if so, (a) what the boundaries of such additional territory should be; (b) whether such additional regulation should be by a separate order or expansion of Order #27; and (c) the terms and conditions respecting scope, classification, class prices, differentials, distribution of proceeds to producers, and administrative provisions. (22 F.R. 4194-4195).

There is no mention whatsoever of milk or milk products in foreign commerce in the foregoing. It follows that it wasn't an issue, and wasn't considered. In his conclusions (22 F.R. 4196, 218a, 219a), the Secretary states:

> "ISSUE No. I
>
> It is concluded that:
>
> 1. The handling of milk in Northern New Jersey and Upstate New York should be brought under Federal regulation.
>
> 2. Such regulation should be by means of a single milk marketing order applicable to a single marketing area including the present Order No. 27 marketing area together with Northern New Jersey and Upstate New York, and
>
> 3. Such single milk marketing order should be Order No. 27 appropriately amended to apply to the expanded area."

Again there is no mention of milk and milk products in foreign commerce nor is there any conclusion relating thereto nor any provisions that they should be regu-

lated in any way. Under Issue No. II (terms and provisions) he discusses *"Milk for Fluid Use Outside the Marketing Area"* and again there is no mention of foreign commerce nor any consideration of milk and milk products in the current of foreign commerce nor any suggestion that any provision of Order #27 should apply thereto. The same is true of these Class II and Class III classifications of fluid cream and its pricing (22 F.R. 4209-4210), (F.R. 4210-4211), and, again, there is no mention whatsoever in any part of these findings of fact or in the order relating to, or regulating milk and milk products, in foreign commerce.

Consequently, this fluid cream wasn't, and couldn't be regulated by the Secretary and is not subject to the classifications in other provisions of Order #27.

IV. The Amendment of Order No. 27 of November 5th, 1951, Relating to the Classification of Milk and Milk Products (Including Fluid Cream) Delivered to Ships at Docks in the Marketing Area Doesn't Apply to the Fluid Cream

The findings of facts relating thereto are that, even though it may not have been definitely established that milk delivered to ships from plants outside the marketing area is equally subject to marketing area health authority regulations, it appears much more logical that such regulations would be applicable to so-called commissary milk than to cargo milk. *An indeterminable portion of commissary milk can reasonably be expected to be consumed while the carrier is moored within the legal bounds of the marketing area.* That is unlikely to be the case, however, with cargo milk especially packaged for, and expressly consigned to a foreign or other distant buyer. (Emphasis supplied). (16 F.R. 11351-11352)

These findings of fact show that only two situations were considered. These were commissary milk and fluid cream delivered to ships at New York City docks for consumption by the crew in the New York harbor and cargo milk and fluid cream delivered in the area which is now the New York Metropolitan District of the New York-New Jersey Milk Marketing area for transportation through the market for use outside of the market. No consideration was given to commissary milk and cream in transit through New York City for consumption by the passengers upon ships on the high seas, in the current of foreign commerce and also, for use outside the market. The different treatment given those considered was based upon place where the milk and fluid cream was used or consumed. Consumption on the ship by the crew in the harbor was held to be a delivery within the market. However, cargo milk merely in transit through the market and delivered to a ship was not considered a delivery within the market. This clearly shows that there was no intent to regulate this fluid cream by this provision of the order.

It is also most obvious, that the true intent of said section and order was to regulate those milk products, including fluid cream which were utilized in the New York Metropolitan District and to exempt from regulation, those products which entered the district but which weren't utilized there. The findings relating to this and used as a basis for this delivery provision, were the consumption of these milk products by the crews of ships while in the harbor. Consequently, there was no intent to apply this provision to a delivery of the fluid cream involved here.

The delivery of this fluid cream upon order of the purchasing department of American Export Lines,

Inc., to its ships at docks in New York City to be used upon the high seas, was for transit purposes only. Besides, the ship in the district is neither a plant, nor a purchaser, as contemplated by the order. Under these circumstances, such deliveries are, in fact, a constructive delivery to the purchaser at its office in Hoboken, New Jersey, which is out of the district, and as such must be treated as being governed by the provisions of the language of Sec. 927.37(d)(1), which reads: "delivered to plant or purchaser outside the New York Metropolitan District". Besides, it "remains outside the district" and it is not intended for use, nor is it in fact, used in the district which it leaves unopened and unused in transit and within a few hours. The sellers situation in this case is merely that of a conveyor or trucker, of the products from the purchaser's office, which is out of the district, to the ship, just as if the purchaser itself had received the fluid cream in Hoboken and transported it by its own truck to its ships in New York City. Certainly, if the purchaser transported this fluid cream by its own trucks from Hoboken to New York City, such would certainly be entitled to the Class III designation. The same result would follow if the purchaser employed a third party as its trucker to do so. This illustrates the transitory nature of this transaction into and out of the New York Metropolitan District.

The delivery of this fluid cream in the manner heretofore discussed, wasn't a delivery at all within the meaning of Sec. 927.37(d)(1) of the order, but merely a transfer in transit. It was obviously to be delivered to a carrier for transfer out of the district. It was kept in original cartons until out of the district; never opened until out of the district; and it was placed in

the cargo area of the ship. The defendant recognizes that cargo fluid cream is in transit and not subject to this regulation. Such would also be true of fluid cream similarly delivered to a boat destined for southern ports or to a train in the district for continued shipment and use out of the district. Plaintiff also recognizes that milk or milk products (including fluid cream) in transit through the district is not subject to this control.

V. The Case Involves a Substantial Federal Question of General Importance

This fixing of a higher price for identical fluid cream by classifying it as Class II in the New York Metropolitan District of the market, and classifying it as Class III in the New Jersey and other areas of this New York-New Jersey Milk Marketing Area is contrary to the directions of Congress to protect the consumer and public interest. The volume of this fluid cream sold in the New York Metropolitan District is very large and the value of it is many millions of dollars yearly. This approximate fifteen percent (15%) higher price is also costing these consumers in the New York Metropolitan District extra millions of dollars annually. Such is not protecting them and is not in the public interest.

The Secretary of Agriculture has promulgated, and there now exists over seventy-five (75) Federal Milk Orders throughout the United States. The number and extent of these orders is increasing. Serious consideration is being given to the regulation of the entire New England and Mid-Atlantic areas by a single order. If the Secretary is upheld here in his total disregard for this section of the statute by reason of the arguments

he has made for his powers, this situation will undoubtedly be magnified by a large number of classifications which disregard the foregoing provisions of the law. There are others presently existing in the present order relating to the classification of fluid mlik which are erroneous. In Sec. 927.37(a)(b) there are two classes established for fluid milk and applying to the idential product in respect to form and purpose for which used, but separately classified and differently priced based upon whether this fluid milk is marketed within or without the marketing area. The importance of milk and its regulation economically has been recognized by this Court from its many decisions commencing with *Nebbia* v. *New York,* 291 U.S. 502, and continuing through the case of *Lehigh Valley Cooperative Farmers, Inc., et al* v. *U. S. of America, et al,* 370 U.S. 76 (1962). The will of the Congress must be followed. The Milk Industry is too large and too important to allow a situation such as this to continue.

VI. Constitutional Questions Presented

In the event it be held that the fluid cream involved here was in the current of foreign commerce (and such is contended to be so) then a constitutional question is presented as to the power of the Secretary to regulate it under a power without any standards to guide such regulation.

VIII. The Decision of the Court Below Is Erroneous

This is so for the reasons heretofore discussed. These include:

1. It ignores the mandatory terms and conditions of Sec. 608(c)(5)(A) relating to the basis for classifying fluid cream;

2. There is no legal basis for creating a market within a market relating to fluid cream in the New York-New Jersey Milk Marketing area;

3. This fluid cream was in the current of foreign commerce and unregulated;

4. The order doesn't cover fluid milk delivered to ships for consumption on the high seas by passengers; and

5. This fluid cream was in transit through the New York Metropolitan District and not regulated.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD W. CURRIE
Edward W. Currie,
123 Main Street
Matawan, New Jersey
Counsel for Petitioners

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APPENDIX A

Provisions of U. S. Constitution and Statutes Involved

U.S.C.A. Constitution, Vol. 1, p. 104, Article 1, Section 1.

All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

U.S.C.A. Constitution, Vol. 1, p. 200, Article 1, Sec. 8, Clause 3.

To regulate commerce with foreign Nations, and among the several States, and with Indian Tribes.

7 U.S.C.A. 602, p. 420. *Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation.*

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to estab-

lish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c (2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of Agriculture under this chapter, to continue for the remainder of any marketing season or marketing year, such regulations pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of said sections. May 12, 1933, c. 25, Title I, Sec. 2, 48 Stat. 32; Aug. 24, 1935, c. 641, Secs. 1, 62, 49 Stat. 750, 782; June 3, 1937, c. 296, Secs. 1, 2(b), 50 Stat. 246, 247; Aug. 1, 1947, c. 425, Sec. 1, 61 Stat. 707; July 3, 1948, c. 827, Title III, Sec. 302(a), 62 Stat. 1257; Aug. 28, 1954, c. 1041, Title IV, Sec. 401(a), 68 Stat. 906; Aug. 8, 1961, Pub. L. 87-128, Title I, Sec. 141(1), 75 Stat. 303.

7 U.S.C.A. 608c (1), p. 449. *Orders regulating handling of commodity—Issuance by Secretary.*

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations or

producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers". Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

7 U.S.C.A. 608c (5), p. 450. *Milk and its products; terms and conditions of orders.*

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

7 U.S.C.A. 608c (15) A & B, p. 458, 459. *Petition by handler for modification of order or exemption; court review ruling of Secretary.*

(15)(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof

or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with the law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

APPENDIX B

Provisions of Order Involved

Sec. 927.3. *Marketing Area.*

"New York-NewJersey milk marketing area" (hereinafter called the "marketing area") means all of the territory within the boundaries of the city of New York, and the counties and parts of counties set forth in paragraphs (a) and (b) of this section together with all piers, docks and wharves connected therewith, and all craft moored thereat, and including territory within such boundaries which is occupied by Government (Municipal, State, Federal or International) reservations, installations, institutions or other establishments.

(a) The city of New York and counties of Nassau, Suffolk (except Fisher's Island), and Westchester in the State of New York (such territory being referred to hereinafter as the "New York metropolitan district").

(b) The following counties and parts of counties in the State of New York: Albany; Broome; Cayuga (except the townships of Sterling, Victory, Conquest, and Montezuma); Chemung; Chenango; Columbia; Cortland; Delaware; Dutchess; that part of Essex consisting of the townships of Schroon, Ticonderoga, Crown Point, and Moriah; Fulton (except the township of Stratford); Greene; Herkimer (except the townships of Webb, Ohio, and Salisbury); Madison; Montgomery; Oneida (except the townships of Ava, Boonville, Forestport, and Florence); Onondaga; Orange; Oswego (except the townships of Redfield and Boylston); Otsego; Putnam; Rensselaer; Rockland; Saratoga (except the townships of Day, Edinburg, and Providence) Schenectady; Schoharie; Schuyler; that part of Steuben consisting of the townships of Addison, Corning, and Erwin; Sullivan; Tioga; Tompkins; Ulster, Warren (except the townships of Johnsburg, Thurman, and Stony Creek); Washington; and Yates (except the townships of

Italy, Middlesex, and Potter); and in the State of New Jersey: Bergen; Essex; Hudson; Hunterdon; Middlesex; Monmouth; Morris; Ocean (except the boroughs of Barnegat Light, Beach Haven, Harvey Cedars, Ship Bottom, Surf City, Tuckerton and the townships of Eagleswood, Lacey, Little Egg Harbor, Long Beach, Ocean, Stafford, and Union); Passaic; Somerset; Sussex; Union; and Warren.

Sec. 927.4. *Person.*

"Person" means any individual, partnership, corporation, association, or any other business unit.

Sec. 927.5. *Dairy Farmer.*

"Dairy farmer" means any person who producers milk.

Sec. 927.6. *Producer.*

"Producer" means any dairy farmer whose milk is delivered direct from farm to a pool plant.

Sec. 927.7. *Handler.*

"Handler" means (a) any person who engages in the handling of milk or products therefrom, which milk was received at a pool plant, or at a plant approved by any health authority as a source of milk for the marketing area, (b) any person who engages in the handling of milk, concentrated fluid milk, cultured or flavored milk drinks, cream, half and half, or skim milk, all or a portion of which is shipped to, or received in, the marketing area, or (c) any cooperative association of dairy farmers with respect to any milk which it causes to be delivered from dairy farmers to a pool plant of any other handler for the account of such association and for which such association receives payment.

Sec. 927.9. *Pool plant.*

"Pool plant" means any plant which is designated as a pool plant pursuant to Secs. 927.25, 927.28, or 927.29.

Sec. 927.30. *Basis of classification.*

All milk the butterfat from which is received at a plant at which the classification of milk received from producers is to be determined pursuant to Sec. 927.33, and all milk entering the marketing area in the form of milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, fluid cream products, cream, half and half or skimmed milk shall be classified in accordance with the form in which it is held at, or moved from, the plant at which classification is determined. Such classification shall be subject to the conditions set forth in Secs. 927.31 through 927.35.

Sec. 927.33. *Plant at which classification is to be determined.*

Classification shall be determined at the plant at which milk is received from dairy farmers: *Provided,* That if such milk is shipped in the form of milk or cream to another plant or other plants, it shall be classified, subject to the provisions of paragraphs (a) and (b) of this section, at the plant or plants to which it is shipped, and there shall be no limit on the number of interplant movements in the form of milk or cream except as set forth in paragraphs (a) and (b) of this section.

Sec. 927.37. *Classes of utilization.*

Subject to all of the conditions set forth in Secs. 927.30 through 927.36, milk shall be classified at the plant at which classification is to be determined as follows:

(a) Class I-A milk shall be all milk, except as provided in paragraph (b) of this section and in subparagraphs (3) and (5) of paragraph (d) of this section, the butterfat from which leaves or is on hand at the plant in the form of milk, concentrated fluid milk, fluid milk products, or as cultured or flavored milk drinks containing 3.0 percent or more but not more than 5.0 percent of butterfat, and all

milk the classification of which it not established in some other class named in this section.

(b) Class I-B milk shall be all milk, except as provided in subparagraphs (3) and (5) of paragraph (d) of this section, the butterfat from which leaves the plant in the form of milk, concentrated fluid milk, fluid milk products, or of cultured or flavored milk drinks containing 3.0 percent or more but not more than 5.0 percent of butterfat, and which is delivered to a plant or a purchaser outside the marketing area and remains outside the marketing area.

(c) Class II milk shall be all milk the butterfat from which leaves or is on hand at the plant in the form of cream, sweet or sour, half and half, fluid cream products, or in the form of cultured or flavored milk drinks, containing less than 3.0 percent or more than 5.0 percent of butterfat, unless such cream, half and half, fluid cream products, or cultured or flavored milk drinks are established to have been so handled or marketed as to classify such milk in some other class named in this section.

(d) Class III milk shall be all milk which meets the conditions set forth in any one of the following subparagraphs:

(1) All milk the butterfat from which leaves or is on hand at the plant in the form of cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent of butterfat or in the form of cream, half and half, or fluid cream products which cream, half and half, fluid cream products, or cultured or flavored milk drinks is delivered to a plant or a purchaser outside the New York metropolitan district and remains outside the New York metropolitan district.

APPENDIX C

Opinion of the United States Court of Appeals for the Third Circuit

(Filed August 13th, 1965)

By HASTIE, *Circuit Judge.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15078

WINDHAM CREAMERY, INC., *Appellant*

v.

ORVILLE L. FREEMAN, *Secretary of Agriculture*

Appeal from the United States District Court for the District of New Jersey

Argued April 1, 1965

Before: HASTIE and FREEDMAN, *Circuit Judges;* and WEBER, *District Judge.*

OPINION OF THE COURT

(Filed August 13, 1965)

By HASTIE, *Circuit Judge.*

In this proceeding, authorized by section 8c(15)(B) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C., 608c(15)(B), Windham Creamery, Inc., a fully regulated handler of milk that operates a pool plant in Windham, New York, contends that so much of the New York—New Jersey Milk Marketing Order,[1] hereinafter designated Order No. 27, as establishes a different classification and a higher price to be paid by handlers for fluid cream distributed in the New York City area than

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[1] 7 C.F.R. § 1002.37 (Supp. 1965), superseding 7 C.F.R. § 927.37 (Supp. 1961).

for the same product disposed of elsewhere in the New York—New Jersey marketing area is invalid either on its face or as applied.

Under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608c, milk prices are subject to a comprehensive plan of regulation designed to insure a fair return to farmer producers. The Act, recognizing that milk has a variable market value dependent upon its ultimate use, authorizes the Secretary of Agriculture to classify milk in the light of that circumstance and to establish on a regional basis minimum prices for each class of milk to be paid by "handlers".[2] Instead of paying these prices directly, all handlers in a regulated region pay their producers a prescribed uniform blend price based on the average value of milk produced in the area and thereafter settle their accounts by either paying into or drawing from a producer settlement fund the difference between the actual utilization value of the milk they handled and the blend price. See 7 U.S.C. § 608c(5).

As a general rule milk is classified at the last plant to which it is shipped. See 7 C.F.R. § 927.33 (Supp. 1961). The milk involved in this controversy was shipped by Windham to the plant of Fairlawn Dairies, Inc., an affiliated corporation in Fairlawn, New Jersey, where it was processed into fluid cream. The cream was sold to American Export Lines, Inc., for delivery to the purchaser's ships, some docked in New York City and others in Hoboken, New Jersey. The cream was purchased for shipboard use after sailing, and none of it was actually consumed within the territorial waters of the United States.

Order No. 27 classifies cream as a class II product (on a descending utilization value scheme from I to III) unless

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[2] "Handlers" of the type here involved purchase the raw product from dairy farmers, process it and resell milk and milk products in commerce. For the statutory definition of "handlers", see 7 U.S.C. § 608c(1).

it "is delivered to a plant or a purchaser outside the New York metropolitan district and remains outside the New York metropolitan district", in which case it is class III. See 7 C.F.R. § 927.37 (Supp. 1961). The order so defines "New York metropolitan district" as to include New York City and its docks and to exclude the adjacent New Jersey area, including the Hoboken docks, thus subdividing the New York—New Jersey marketing area for particular purposes. See 7 C.F.R. § 927.3 (Supp. 1961). Accordingly, the Market Administrator required Windham to pay class II prices for the cream delivered to ships docked in New York City as contrasted with class III prices for the same product delivered to ships docked in Hoboken, New Jersey.

Windham unsuccessfully challenged this ruling before the Secretary of Agriculture. It then brought suit in the court below. The present appeal has been taken from summary judgment entered in favor of the Secretary. D.N.J. 1964, 230 F.Supp. 632.

Windham's first contention is that a difference in classification of a uniform product based on geographic movement and place of delivery to the purchaser, is not in compliance with the statutory scheme and requirement of "classifying milk in accordance with the form in which or the purpose for which it is used". 7 U.S.C. § 608c(5)(A). The Secretary agrees that the form of the two classes of cream is the same but claims that, within the meaning of the statute, "the purpose for which it is used" has properly been found to be different.

The evolution of the New York—New Jersey milk order to its present state has relevance for the problem here presented. Until 1957 the scheme of regional administration established and defined a "New York metropolitan " marketing area, consisting of and limited to New York City and three neighboring suburban counties in New York State. See 7 C.F.R. § 927.3 (1955). The New

York metropolitan milk order classified cream disposed of within the marketing area by a regulated handler as a class II product, while cream disposed of by such a handler outside the then marketing area was made class III. See 7 C.F.R. § 927.37 (1955). In 1957 an amended order enlarged the marketing area to include northern New Jersey and new sections of upstate New York, in addition to the metropolitan area. See 22 Fed. Reg. 4195 (1957). However, the pre-existing dichotomy in cream classification was maintained by subdividing the enlarged marketing area. The original New York metropolitan marketing area was denominated the "New York metropolitan district", within which a basic class II designation of cream was retained. However, cream delivered and remaining in the other parts of the marketing area was placed in class III, as it had been under the earlier order. This difference reflected a finding that the economic value of the commodity was lower outside of the New York metropolitan area where less stringent local health regulations and other factors created competitive conditions different from those within the metropolitan area. See 22 Fed. Reg. 4195 (1957). It is the resulting distinction in classification and price, depending upon place of delivery, of which Windham complains.

Over the years the Secretary has taken the position that the achievement of a price structure which respects differences in the utilization value of milk and milk products is a basic concern and objective of the legislative scheme of regulation. Accordingly, it has been reasoned that statutory authority to classify milk according to "the purpose for which it is used" comprehends classification determined by differences in utilization value. The utilization value of a given form of milk may differ from community to community because of circumstances characteristic of the locale; for example, differences in the requirements of health laws in various communities. Thus, in the present case, health standards and requirements with

reference to the processing and distribution of milk have been found to be significantly different in the New York metropolitan district than in neighboring New Jersey communities with the result that cream has a higher utilization value in the metropolitan district than in the outlying New Jersey area. Nothing before us indicates that this finding is unwarranted. It seems reasonable, therefore, and respectful of the statutory scheme to assign a lower classification to milk delivered and utilized outside of the New York metropolitan district than to the same product handled and distributed within it. It is also relevant that throughout the 25 year history of this basic legislative scheme the Secretary has employed similar geographic movement as a proper basis of classification without legislative or judicial interdiction. See, e.g., 4 Fed. Reg. 376 (Kansas City area order, § 913.4(b)). All of these circumstances considered, we think it would be improper for us to invalidate such a classification so long as it is grounded, as now appears, in a significant factual difference in utilization value.

It remains to consider Windham's contention that even if classification based on geographic movement of a commodity is permissible where the distinguishing movement carries the commodity outside of a marketing area, it is not permissible to make different classifications for situations where all relevant movements are only from one part of a marketing area to another. We think this position could be sound only if no significant difference in utilization value of the commodity were found in the designated separate parts of a marketing area. For it is that difference, rather than geography per se, which provides the rational basis for any geographic classification.

In the present case, the challenged order gives effect to the very differences in utilization value, expressed in terms of the same separate localities that served to distinguish class II cream from class III when those localities

were not in the same marketing area. No relevant factor has changed except the boundaries of the marketing area. We find nothing in the statute that requires that an otherwise rationally justified geographic classification be invalidated merely because the localities involved are all within the same marketing area.

Making an entirely different point, Windham argues that the challenged classification of cream sold to ships, insofar as it is made applicable to a commodity intended for use and in fact used exclusively on the high seas in the course of foreign commerce, is an unauthorized regulation of foreign commerce.

Without considering the extent of the Secretary's authority under the Act to regulate foreign commerce, we think the relation of the regulation and the milk in question to domestic commerce is adequate to justify what has been done as an exercise of the Secretary's unquestioned power in the area of interstate commerce. Section 927.3 of Order No. 27, 7 C.F.R. § 927.3 (Supp. 1961), expressly includes within the New York—New Jersey marketing area all piers and docks connected with the included land mass and "all craft moored thereat". In one view, this merely gives effect to geographic reality. Moreover, the Secretary has explicitly found with reference to milk delivered to docked ships for consumption thereon—so called "commissary milk"—that "an indeterminable portion of commissary milk can reasonably be expected to be consumed while the carrier is moored within the legal bounds of the marketing area". 16 Fed. Reg. 11352 (1951). No basis appears here for challenging the correctness of this general finding. It provides a reasonable basis for extending a scheme of domestic regulation to such milk.

It is also relevant that in origin and handling the milk in controversy was part of that complex of domestic production, processing and disposition which is a phenomenon and a problem of that domestic commerce with which the

statute and its administration are primarily concerned. Thus, the Secretary has permissibly found that "milk delivered to ships for consumption thereon . . . has been supplied by pool handlers and from processing plants located within the marketing area. Since such plants are permitted to handle only milk from approved sources, it follows that milk furnished to ships and institutions from marketing area plants can come only from approved sources." 16 Fed. Reg. 11352 (1951).

When the matter is thus analyzed it appears that all of the relevant events and consequences justifying classification are local or domestic in character. The incidental fact that, after being subjected to the regulatory scheme in the course of domestic processing and disposition by a handler, the commodity in some instances moves in foreign commerce does not derogate from the Secretary's power to regulate what is in fact and law an integral part of domestic production and marketing.

A closely related contention is made that a classification on the basis of delivery in New York is arbitrary when applied to milk proved to have been delivered to a purchaser for consumption on the high seas. But the normal anticipation is that milk delivered by handlers to purchasers in a community will be consumed there and, in any event, will be subjected to those local health regulations that affect utilization value. To require the subordination of this normal expectation to the actual experience of each quantity of milk sold might well be burdensome and impractical to the extent of impairing effective classification. We think this consideration in itself is sufficient to warrant disregard of the place of actual consumption.

Finally, the petitioner urges that a fiction of "constructive delivery" on the high seas should be applied to the milk delivered at New York piers, thus entitling such milk to the lower classification which attends delivery outside of the New York metropolitan district. The petitioner

points out that a concept of "constructive delivery" was approved and applied in *Dairymen's League Co-op. Ass'n* v. *Brannan*, 2d Cir. 1949, 173 F.2d 57, 62-63, *cert. denied*, 1949, 338 U.S. 825. But there, in an effort to avoid a higher classification applicable to milk delivered to a purchaser in an "approved" county, a handler accepted formal delivery in an "unapproved" county and immediately moved the milk to its plant in the "approved" county. The court sanctioned the higher classification for this milk, treating it as "constructively" delivered in the "approved" county. This application of a fiction may well be warranted to avoid circumvention of a regulation by deliberate subterfuge. But a device utilized to thwart an attempted evasion of a classification scheme need not be employed to enable parties to escape the normal consequences of their agreed and actual conduct under the general scheme of classification.

While Windham has advanced still other arguments, we think they have been adequately analyzed by the Secretary, and the court below, and we think they do not require further discussion. We have considerd all of them and reject them as unsound.

The judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15078

WINDHAM CREAMERY, INC., *Appellant*

v.

ORVILLE L. FREEMAN, *Secretary of Agriculture*

(D.C. Civil No. 957-61)

On Appeal From the United States District Court
For the District of New Jersey

Present: HASTIE and FREEDMAN, *Circuit Judges* and WEBER, *District Judge*

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered June 3, 1964 in this case be, and the same is hereby affirmed.

ATTEST:

IDA O. CRESKOFF
Clerk

August 13, 1965

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 713

WINDHAM CREAMERY, INC., AND
FARMLAND DAIRIES, PETITIONERS

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 230 F. Supp. 632. The opinion of the court of appeals (Pet. App. 9a–16a) is reported at 350 F. 2d 978.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a) was entered on August 13, 1965. The petition for a writ of certiorari was filed on November 2, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the provisions of the New York-New Jersey Milk Marketing Order relating to the classi-

fication and pricing of fluid cream are a valid exercise of the authority of the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937.

2. Whether the classification and pricing provisions of the Milk Marketing Order are applicable to petitioners' deliveries of cream within the marketing area for ultimate consumption on ships outside the United States.

3. Whether, under the provisions of the Order, petitioners' cream delivered to ships at piers in New York City was properly classified and priced as Class II milk.

STATUTE AND ORDER INVOLVED

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 [1] and the New York-New Jersey Milk Marketing Order [2] are set out in the Appendix, *infra,* pp. 15–18.

STATEMENT

Petitioner, Windham Creamery, Inc., operator of a milk pool plant in Windham, New York, was a fully regulated "handler" as defined in Section 8c(1) of the Agricultural Marketing Agreement Act of 1937,

[1] Act of June 3, 1937, 50 Stat. 246, as amended, 7 U.S.C. 601, *et seq.*, re-enacting and amending provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31, as amended by Act of August 24, 1935, 49 Stat. 750).

[2] Order No. 2 (formerly Order No. 27), as amended, 7 C.F.R. 1002.1, *et. seq.* (1965 Rev.), superseding 7 C.F.R. 927.1, *et seq.* (1961 Supp.). To maintain consistency with the record, the decisions below, and the petition, we shall refer to the order as No. 27 and, unless otherwise indicated, cite to the 1951 Supplement of 7 C.F.R.

50 Stat. 246, as amended, 7 U.S.C. 608c(1), *infra*, p. 15. Windham received raw milk from farmers and shipped it to a New Jersey plant owned by petitioner Farmland Dairies, Inc., Windham's parent corporation,[3] where it was processed into fluid cream. American Export Lines, Inc., purchased some of this cream from Farmland and had it delivered to some ships docked in New York City and others docked in Hoboken, New Jersey. Petitioners instituted these proceedings under Section 8c(15) of the Act, 7 U.S.C. 608c(15), *infra*, pp. 16–17, to challenge the provisions and application of the New York-New Jersey Milk Marketing Order ("Order No. 27") under which the cream delivered to American Export's ships was classified.

1. *Background.* The following brief sketch of the economic, statutory and administrative background of Order No. 27 may be helpful to the Court.[4]

The supply of milk and the demand for it are subject to sharp variations. Apart from considerable fluctuations in the daily demand for milk, there are seasonal cycles in the supply, so that there is nearly twice as much milk available in June as there is in November. Storage of the excess supply to meet a later peak in demand is not possible because of the highly perishable nature of fluid milk. Surplus milk,

[3] While this case was pending before the court of appeals, Windham was dissolved and its operations and assets taken over by Farmland (Pet. 5).

[4] A more detailed discussion of the regulation of the milk industry may be found in *Nebbia* v. *New York*, 291 U.S. 502; *United States* v. *Rock Royal Co-op*, 307 U.S. 533 (involving Order No. 27); and *H. P. Hood & Sons* v. *United States*, 307 U.S. 588.

i.e., the milk which exceeds the current demand for fluid milk as a beverage, is utilized in the production of cream, butter, cheese, milk powder, and similar items, but for those purposes, it can be sold only at a greatly reduced price. In an unregulated market, the vigorous competition of producers for the more profitable sales of fluid milk results in business practices which jeopardize both the commodity's quality and the quantity available.[5] Regulation of the industry seeks to eliminate this situation and to distribute equitably among producers the burden of the lower value surplus milk.

Under the Agricultural Marketing Agreement Act—which provides a scheme for regulating the marketing of milk and its products in the current of, or affecting, interstate or foreign commerce—the Secretary of Agriculture is authorized to issue regional milk marketing orders, each specially adapted to the conditions of the area in which it is to be effective. 7 U.S.C. 608c(5), (11). The orders are to be designed to assure uniform minimum prices to each milk producer, regardless of the use to which his milk is ultimately put, while fixing payments by handlers in accordance with the uses they actually make of the milk and the value to the handlers of those uses.[6]

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[5] See *United States* v. *Rock Royal Co-op.*, *supra*, 307 U.S. at 550; *Nebbia* v. *New York*, *supra*, 291 U.S. at 518.

[6] The Act specifies that a milk order shall contain one or more of certain terms and conditions, including the following: (1) the classifying of milk in accordance with its form or its utilization; (2) the fixing, or providing a method for the fixing, of minimum uniform prices for each use classification which all handlers shall pay; (3) the payment of uniform prices to producers irrespective of the ultimate use of their

In 1938, pursuant to this authority, the Secretary issued Order No. 27, categorizing all milk subject to regulation in the marketing area into three general classes (I, II and III), reflecting, in descending order, the differing economic values of milk depending on its end use. 7 C.F.R. 927.37. For example, fluid milk used as a beverage, having the highest value, was designated as Class I. Under this Order, pool plant handlers are required to report to a Market Administrator the quantity of milk they purchase each month, broken down into the three classes according to utilization. 7 C.F.R. 927.50. The Market Administrator determines the minimum price for each class (7 C.F.R. 927.40, *et seq.*) and, applying these prices to the total reported utilizations for the month, calculates a uniform or "blend" price (7 C.F.R. 927.65, *et seq.*), which is the minimum price each pool plant handler must pay each producer for the milk supplied the plant by that producer. 7 C.F.R. 927.70. The Market Administrator maintains a "Producer Settlement Fund" for the adjustment of accounts among the various handlers in the area. 7 C.F.R. 927.75. If the use value of the milk disposed of by a handler during the month (calculated on the basis of the minimum prices set by the Administrator and the quantities of each class of milk disposed of) exceeds the total "blend" price he is required to pay his producers, he must deposit the excess into the fund. If the use

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milk; and (4) the adjustment of the payments by handlers in order that the total sum paid by a handler for milk purchased by him shall not be less than the value of the milk at the use classification prices. 7 U.S.C. 608c(5).

value of the milk disposed of is lower than the total "blend" price he is required to pay, the handler is entitled to receive the difference from the fund.

The marketing area covered by Order No. 27 as originally issued consisted of the five counties in New York City and the three suburban counties of Westchester, Nassau and Suffolk. 3 Fed. Reg. 1945, 1957, 2100, 2102. In 1951, the Order was amended to include all piers, docks and wharves within the eight counties and all craft moored there. 16 Fed. Reg. 12851, 7 C.F.R. 927.3. Finally, in 1957, the marketing area was extended to northern New Jersey and certain additional areas in upstate New York. 22 Fed. Reg. 4644, 7 C.F.R. 927.3.

Before the 1957 amendment, all cream in New York City and the three suburban counties—which were designated in 1957 as the "New York metropolitan district" (7 C.F.R. 927.3(a))—was categorized in Class II, while cream distributed outside that area was placed in Class III.[7] This classification reflected the fact that cream sold in the metropolitan district had a higher economic value than cream disposed of elsewhere. When, after lengthy proceedings,[8] the Secre-

[7] Under Order No. 27, all of the milk disposed of by a fully regulated handler, and not merely that portion which is disposed of in the marketing area, is pooled, classified and priced. See 7 C.F.R. 927.29, 927.33.

[8] Public notices were given (21 Fed. Reg. 3537, 3799, 6680; 22 Fed. Reg. 1219); public hearings, at which evidence was taken, were held, and an extensive record was compiled (22 Fed. Reg. 4194). A recommended decision was issued (22 Fed. Reg. 3318) and time was given to file exceptions thereto. The Secretary's final findings and conclusions were issued on June 10, 1957 (22 Fed. Reg. 4194).

tary decided to broaden the marketing area covered by Order No. 27 to include parts of New Jersey and additional parts of New York, he also considered the question of the classification of cream in the added areas. On the basis of the record evidence as to the utilization value of cream and the various proposals made by both producer and handler interests, the Secretary determined that the cream disposed of in the pre-1957 marketing area could command a higher price (*i.e.*, had a greater utilization value to the handler) than cream disposed of elsewhere. 22 Fed. Reg. 4210. Giving effect to the premise of all concerned that the classification of milk products should be based on utilization value, the Secretary determined that cream should continue to be classified as Class II under Order No. 27, with the exception that cream disposed of outside the New York metropolitan district would be priced at the Class III level. 22 Fed. Reg. 4649, 7 C.F.R. 927.27(c), (d)(1), *infra*, p. 18.

2. *Decisions Below.* Petitioner Windham challenged the provisions under which the cream it delivered in New York City was classified in Class II while the cream delivered in New Jersey was classified in Class III. After extensive proceedings, the Secretary, acting through his Judicial Officer, denied Windham's protest. He ruled that the different pricing for cream provided by Sections 927.37(c) and (d)(1) of the Order had been established to return to producers the greater use value which their milk had when disposed of in the New York metropolitan district [9] and

[9] In this connection, the Secretary referred to the proceedings connected with the 1957 amendment of Order No. 27, and to the

that those sections not only were authorized but were necessary to reflect economic conditions that affected market supply and demand for milk and its products in the various parts of the marketing area (C.A. App. 140a–141a). The Secretary also ruled that the delivery of the cream to the ships docked in New York City clearly was delivery within the New York metropolitan district as defined by Order No. 27; that a sufficient basis had been shown for including piers, docks, wharves and all ships moored there within the area of regulation; and that there was no basis for adopting a construction of Section 927.37 to avoid the Class II classification of petitioners' deliveries in New York City (C.A. App. 135a–139a).

On review of the administrative decision, the district court granted summary judgment in favor of the Secretary, upholding his ruling in all respects, and the court of appeals affirmed.

ARGUMENT

1. At no point during the administrative or judicial proceedings below did petitioners assert or attempt to show that there was insufficient support for the Secretary's finding—upon which his classification was based—that cream has a greater utilization value in the New York metropolitan district than it does in northern New Jersey and upstate New York. Nor have petitioners suggested that the Class II and III prices established by the Order do not correctly reflect

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fact that the evidence there presented demonstarted that cream commanded a higher price in the New York metropolitan district than outside of that area (C.A. App. 131a–134a; 140a–141a).

these differences in utilization value. In these circumstances, there can be no serious claim that the challenged sections of the Order are discriminatory in operation. Petitioners pay the same minimum price for cream disposed of within the metropolitan district (Class II) and outside the district (Class III) as do all other Order No. 27 handlers disposing of cream in the same location, and, in each instance, the price paid fairly reflects the value of the cream to the handler in the market in which it is being utilized.

Petitioners contend (Pet. 8–10), however, that milk having the same physical form and function may not be classified differently on the basis of utilization value under Section 8c(5)(A) of the Act, 7 U.S.C. 608c(5)(A), *infra*, pp. 15–16. That section in terms authorizes the classification of milk in accordance with "the form in which or the purpose for which it is used." Since the basic legislative objective underlying the classification provisions was to insure that the minimum amount each handler pays for his milk reflects the value of that milk in the utilization made of it by him, the Secretary was plainly justified in construing the statutory authorization to classify milk according to "the purpose for which it is used" as comprehending classification determined by differences in utilization value.

As the court of appeals noted (Pet. App. 13a), not only is the Secretary's interpretation of Section 8c (5)(A) reasonable in light of the purposes of the Act, but it has been applied by him since the inception of federal milk marketing regulation without "legislative or judicial interdiction" (Pet. App. 13a). In

United States v. *Rock Royal Co-op.*, 307 U.S. 533, 565–567, this Court considered and rejected the contention that the variant treatment given to fluid milk disposed of in different geographic areas was unlawful. And in Section 4 of the Agricultural Marketing Agreement Act, Congress expressly ratified several milk marketing orders which had previously been issued under the authority of the Agricultural Adjustment Act of 1933, as amended. Under each of these orders, while all fluid milk disposed of by regulated handlers was subject to minimum class prices, the prices fixed for such milk utilized inside the marketing area were different from those applicable to utilization outside of that area. See, *e.g.*, Section 913.4(b) of Order No. 13 (Kansas City, Missouri), 4 Fed. Reg. 3761. The fact that, in the present case, the two classifications for fluid cream relate to disposition in different portions of the same overall marketing area is of no significance. As the court of appeals correctly concluded (Pet. App. 13a–14a):

> In the present case, the challenged order gives effect to the very differences in utilization value, expressed in terms of the same separate localities that served to distinguish class II cream from class III when those localities were not in the same marketing area. No relevant factor has changed except the boundaries of the marketing area. We find nothing in the statute that requires that an otherwise rationally justified geographic classification be invalidated merely because the localities involved are all within the same marketing area.

Even if petitioners were correct in their view that the Secretary was required to place all cream in the marketing area in a single classification—without regard to the economic factors involved—they have failed to show that they were injured by the Secretary's action. While they would naturally prefer that all their cream be placed in the lowest priced category (Class III), the basic cream classification under Order No. 27 has always been Class II, and petitioners have made no contention or showing that this classification is improper. Thus, under petitioners' theory, the exception for cream disposed of outside the metropolitan district would be invalid, and petitioners would be required to pay higher prices for their cream disposed of in New Jersey than they were in fact called upon to pay under the terms of the Order in its present form.

2. Petitioners' contention (Pet. 11–16) that their cream was not subject to regulation because it was in the current of foreign commerce is without merit. Section 8c(1) of the Act, 7 U.S.C. 608c(1), *infra*, p. 15, expressly authorizes the Secretary to regulate milk which "is in the current of interstate or *foreign commerce*, or which directly burdens, obstructs, or affects, interstate or *foreign commerce* * * *" (emphasis added). See also 7 U.S.C. 610(j). Moreover, as the court of appeals pointed out (Pet. App. 14a), the classification of cream involved here was "an exercise of the Secretary's unquestioned power in the area of interstate commerce." In this connection, the court cited the Secretary's finding (16 Fed. Reg. 11352),

which petitioners have not shown to be unfounded, that "an indeterminable portion of commissary milk [*i.e.*, milk delivered to ships for consumption thereon] can reasonably be expected to be consumed while the carrier is moored within the legal bounds of the marketing area." In addition, the court referred to other unchallenged findings of the Secretary which demonstrated that "in origin and handling the milk in controversy was part of that complex of domestic production, processing and disposition which is a phenomenon and a problem of that domestic commerce with which the statute and its administration are primarily concerned" (Pet. App. 14a–15a).[10]

3. Finally, petitioners argue (Pet. 16–19) that all of the cream should be regarded as having been constructively delivered to the purchaser at the latter's office in New Jersey and thus entitled to be classified and priced as Class III milk. The court below refused to adopt this fiction to enable petitioners "to escape the normal consequences of their agreed and actual conduct" (Pet. App. 16a). We submit that the decision below, in this and all other respects, was plainly correct.

[10] Section 927.37 of Order No. 27 merely classifies regulated milk on the basis of its utilization prior to shipment in foreign commerce and without regard to its ultimate utilization. The milk involved here moved in interstate commerce from the State of New York to the plant in Fairlawn, New Jersey, and was transported, in the form of cream and other milk products, in interstate commerce to a purchaser in New York City. Classification was based upon the form in which the milk left the Fairlawn plant (7 C.F.R. 927.30, *infra*, pp. 17–18), and the operation of Section 927.37 was completed before any movement in foreign commerce.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1966.

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APPENDIX

1. The relevant provisions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601, *et seq.*, provide:

7 U.S.C. 602(1):

> Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

7 U.S.C. 608c(1):

> The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

7 U.S.C. 608c(5):

> In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations or producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

* * * * *

7 U.S.C. 608c(15):

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of

complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

2. The relevant provisions of the New York-New Jersey Milk Marketing Order (formerly Order No. 27, 7 C.F.R. 927.1, *et seq.*, now Order No. 2, 7 C.F.R. 1002.1, *et seq.*) which were in effect at the times pertinent to this case are as follows:

7 C.F.R. 927.3(a):

The city of New York and counties of Nassau, Suffolk (except Fisher's Island) and Westchester in the State of New York (such territory being referred to in this part as the "New York metropolitan district").

7 C.F.R. 927.30:

Basis of classification. All milk the butterfat from which is received at a plant at which the classification of milk received from producers is to be determined pursuant to § 927.33, and all milk entering the marketing area in the form of milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, or skim milk, shall be

classified in accordance with the form in which it is held at, or moved from the plant at which classification is determined. Such classification shall be subject to the conditions set forth in §§ 927.31 through 927.35.

7 C.F.R. 927.37:

* * * * *

(c) Class II milk shall be all milk the butterfat from which leaves or is on hand at the plant in the form of cream, sweet or sour, half and half, fluid cream products, or in the form of cultured or flavored milk drinks, containing less than 3.0 percent or more than 5.0 percent of butterfat, unless such cream, half and half, fluid cream products, or cultured or flavored milk drinks are established to have been so handled or marketed as to classify such milk in some other class named in this section.

(d) * * *

(1) All milk the butterfat from which leaves or is on hand at the plant in the form of cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent of butterfat or in the form of cream, half and half, or fluid cream products which cream, half and half, fluid cream products, or cultured or flavored milk drinks is delivered to a plant or a purchaser outside the New York metropolitan district and remains outside the New York metropolitan district.

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